

**VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF FINANCIAL ASSURANCE
ABILITY TO PAY GUIDANCE
LOCAL GOVERNMENTS**

Effective date: 7-1-2002

The policies and procedures set forth in this document are intended solely for the guidance of employees of the Department of Environmental Quality (Department). They are not intended to, nor do they constitute rulemaking by the Department. They may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. Whether and how the Department applies this guidance in any given case will depend on the facts of the case.

1. Introduction

This guidance applies when a local government claims inability to pay civil charges during an enforcement action.

2. Authority

Virginia Code § 10.1-1316 of the Air Pollution Control Law provides authority for considering a person's ability to pay a civil charge or penalty in enforcement cases involving violations of the APCL and applicable regulations. The State Water Control Law and the Virginia Waste Management Act do not address ability to pay issues; however, pursuant to the Department's Enforcement Manual, the Department may reduce a calculated civil charge where a responsible person (RP) demonstrates that a significant economic hardship would result from imposition of the full civil charge.

3. Definitions

The definitions contained in the State Water Control Law, the Air Pollution Control Law and the Virginia Waste Management Act apply. In addition, for purposes of this Guidance, the following definitions apply¹:

“Enterprise Fund” means a fund established to finance and account for the acquisition, operation, and maintenance of governmental facilities and services that are entirely or predominantly self-supported by user charges; or where the governing body of the governmental unit has decided that periodic determination of revenues earned, expenses incurred, and/or net income is appropriate. Government-owned utilities (e.g., water, sewer, and electricity) are ordinarily accounted for by enterprise funds.

¹ These definitions are taken from the MUNIPAY User's Manual published by the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance (September 1999).

“General Fund” means a fund used to account for all transactions of a governmental unit that are not accounted for in another fund. The General Fund is used to account for the ordinary operations of a governmental unit that are financed from taxes and other general revenues.

"Independent, publicly-owned utility” means an entity that is publicly owned but is legally and financially separate from any local government. An example is a regional waste disposal authority.

"Local Government " or "Locality" means a town, village, city, county or independent, publicly owned utility.

4. Review Timing

The Office of Financial Assurance (OFA) generally performs the Ability to Pay analysis upon the request of Regional Office (RO) staff during consent order negotiations. OFA staff reviews the application for completeness within fifteen (15) days of its receipt, completes the Ability to Pay analysis and issues a written recommendation within thirty (30) days of receipt of a complete application. This 30-day period may be extended if the analysis results warrant further inquiry into the applicant's financial status.

5. Application Procedures

5.1 Application Requests

When a local government has claimed inability to pay a civil charge, RO personnel may request an Ability to Pay analysis from OFA. The first step is to request an Ability to Pay application from OFA. The request must include:

- Responsibility Person (RP) name.
- RP address.
- RP telephone number(s).
- Pollution complaint number (PC#) (if applicable).
- Site Name.
- Number and type of occurrences.
- Release report date (if applicable).

- Identification of the RP's type of business entity as one of the following:
 - Individual/sole proprietorship;
 - Bankrupt;
 - Corporation;
 - Partnership;
 - Estate;
 - Non Profit Organization;
 - Local Government
 - Other (limited liability company, other entity, etc.);
- Preferred application filing deadline, if less than thirty (30) days.

Note: Only RPs identified as local governments are evaluated pursuant to this procedure. RPs identified as another type of entity are evaluated according to the appropriate procedure.

5.2 Applicant Preparation

When RO staff requests an Ability to Pay application and provide the information listed in subsection 5.1, OFA staff completes the Ability to Pay Application Instructions (Appendix 1) as indicated below and sends the Application Instructions and the Application (Appendix 2) to the RP at the address indicated in the Ability to Pay analysis request.

5.2.1 Applicant Information

The Financial Responsibility Manager (FRM) fills in the applicant name, address, telephone number, date the application was sent, PC#/permit#/Registration# (if applicable) and site name on the Application Instructions before mailing and marks on the instruction form the documents which the RP must include with the application.

5.2.2 Documents to Request for Local Government Applicants

Local Government Ability to Pay Application: For local government RPs, the RP must file a Local Government Ability to Pay application. The application must be signed by an authorized representative of the locality and notarized.

Other: The applicant must submit any additional information requested on the Application Instructions.

5.3 Application Submittal

The RP must submit an original, signed Ability to Pay application(s) to the mailing address and by the filing deadline specified in the Application Instructions.

5.4 Application Tracking

OFA staff update the necessary Ability to Pay fields in the relevant Comprehensive Environmental Database System (CEDS) module at the time of application issuance and receipt and when the evaluation is complete. OFA staff should utilize this database to track filing deadlines.

6. Review Procedures

The U. S. Environmental Protection Agency (EPA) has developed a computer model (MUNIPAY) which evaluates a local government RP's ability to pay for the environmental costs associated with an enforcement action. The Department utilizes this model to determine whether a locality is in a financial position to pay civil charges. More detailed information on MUNIPAY also can be found in the MUNIPAY User's Manual. Both the User's Manual and the computer model may be downloaded from the web at <http://es.epa.gov/oeca/models/munipay.html>. Electronic copies of the Manual are available from OFA. The FRM should use the MUNIPAY Manual as a guide to input the necessary data and run the Model.

The financial review generally consists of a look at the locality's demographics combined with an analysis of its financial condition. The two reviews are not related and the results of one do not depend on the results of the other. The model conducts the financial review differently depending on the financial structure of the locality.

6.1 Demographic Analysis

The purpose of the demographic analysis is to compare certain of the locality's income and population data with state and national norms. The data may show how the locality's position has changed from 1980 to 1990 both relative to itself and relative to changes in the state norms. The analysis does not provide any specific conclusions; rather it provides the Agency with a better understanding of any long-term changes in the RP's resource base. For example, the demographic analysis may indicate that a locality's population and median income is shrinking. Although the affordability analysis may show that the locality could finance debt to fund environmental expenditures, the FRM may want to take into consideration the shrinking population and resultant decrease in the locality's tax base when making the final Ability to Pay decision. Therefore, the FRM should consider the results of the demographic analysis in conjunction with the results of the affordability analysis when determining a local government RP's ability to pay.

The Model requires the FRM to enter certain income and population data. The data

request form in Appendix 2 asks the RP to provide the specific information. The local government may obtain the 1990 Census data needed to complete the data request form from the U.S. Census data web site at <http://www.census.gov>. The data form provides more specific instructions on how to obtain the census data. 1980 Census data may be obtained from any of the state census data centers. A list of the Virginia centers is provided in Appendix 3 . If the local government fails to provide the required information, the FRM may reject the application or, at her discretion, may attempt to obtain the figures from the resources mentioned above.

6.2 Affordability Analysis

The affordability portion of the analysis assesses the amount of currently available funds and, if necessary, also assesses the amount of funds available through future debt financing.

6.2.1 Cash Availability

Basically, the Model examines the local government's General Fund to determine if there are excess funds available from this source. In each case, the Model calculates a recommended Fund balance by assessing the entity's anticipated expenditures and applying a safety factor. The Model then compares the recommended Fund balance to the actual ending unreserved General Fund balance to determine if any excess funds are available. In the alternative, if the locality has a relevant Enterprise Fund², the Model first looks to this Fund's working capital balance using the same type of analysis described above for the General Fund. If there is no excess working capital, the Model then moves to the General Fund to identify any excess funds. If the RP is an independent, publicly owned utility, the Model looks only at utility's working capital balance to identify any currently available funds.

6.2.2 Debt Financing

If the RP's "cash flow" is insufficient to pay for the environmental expenditure, the Model next attempts to identify any funds available through future debt financing. Debt financing for local governments generally takes the form of bond issues.

General Obligation Bonds: For a locality without a relevant Enterprise Fund, the Model assesses the RP's capacity to issue general obligation bonds.³ General obligation bonds derive their repayment security from the full taxing and revenue-generating capacity of a local government. Debt service payments for these types

² The local government has a relevant Enterprise Fund if it uses the Fund to account for the activities related to the enforcement action.

³ The discussion of general obligation bonds is taken from the MUNIPAY User's Manual, page A-6. (September 1999).

of bonds come from local taxes, usually the local property tax. If levied taxes are insufficient to meet payments, the local authority is legally required to raise the tax rate or broaden the tax base to generate sufficient funds.

Revenue Bonds: If the RP is a local government with a relevant Enterprise Fund or if the RP is an independent, publicly owned utility, the Model looks at the RP's capacity to issue revenue bonds.⁴ Revenue bonds derive their repayment security from the revenues that the debt-funded project generates. For example, wastewater disposal charges cover debt service on bonds issued to build a new wastewater treatment plant. Hence, the cost of these bonds is borne by those paying for the services the funded project provides.

As part of the debt financing analysis, the Model calculates certain ratios based on the RP's financial data before the proposed environmental expenditure. It then compares those ratios to ratios calculated based on the projected financial data after the proposed expenditure. The Model imposes a default threshold value for each ratio. If any of the projected ratios exceeds the Model's threshold value, the total proposed financing is not affordable and the Model then calculates the maximum amount of new financing that is affordable. Because the RP repays its debt through taxes or user fees, the Model also assesses the amount of increase in these tax or fee rates caused by the debt financing and compares them against default threshold amounts to ensure that the cost of financing the debt is not too burdensome.⁵

6.6 Conclusion of Financial Analysis

Once the Model identifies and totals the RP's currently available funds and, if necessary, any funds available through debt financing, it will produce an amount that the RP is able to pay.

6.6.1 Ability to Pay (ATP) Total Is "0"

Where the ATP total is 0, OFA will communicate the results of the analysis to the RO. The RO will evaluate the appropriate civil charge in accordance with the Enforcement Manual.

6.6.2 ATP Total Is Greater Than "0" but less than the Civil Charge

Where the ATP total is more than 0 but less than the calculated civil charge, the FRM communicates the ATP total to the RO as the portion of the civil charge that the analysis indicates the RP is able to pay. The RO will evaluate the appropriate civil charge in accordance with the Enforcement Manual.

⁴ The discussion of revenue bonds is taken from the MUNIPAY User's Manual, page A-6-7 (September 1999).

⁵ A tax or user fee rate increase of 1% is the maximum increase allowed under this analysis.

6.6.3 ATP Total At Least Equal to the Civil Charge/Corrective Action costs

Where the ATP total is greater than or equal to the civil charge, the RP is considered able to pay the civil charge and OFA will communicate this analysis to the RO. The RO will evaluate the appropriate civil charge in accordance with the Enforcement Manual.

7. ATP Recommendation

OFA staff provide a written summary of the ability to pay analysis to the appropriate RO via memorandum. Upon a request from the RO staff, the FRM will provide a written determination of the RP's ability to pay to the RP via letter.

8. Suspensions

Where an RP has failed to submit the required application materials by the filing deadline (usually, within thirty (30) days of the date the application form was mailed) and has failed to obtain an extension of the deadline, the FRM may suspend any further analysis, declare the RP able to pay, and refer the RP to the Regional Office for appropriate action.

9. File of Record

Upon receipt of a request for an ability to pay application, OFA staff will establish an ability to pay file. All information and analyses will be maintained in each applicant's file for a period of 5 years. After this time, the file will be destroyed.

Director, Division of Waste Program
Coordination

Date

**ABILITY TO PAY GUIDANCE
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**APPENDIX 1
ABILITY TO PAY
APPLICATION INSTRUCTIONS**

ABILITY TO PAY APPLICATION INSTRUCTIONS

Applicant Name:	
Address:	
Telephone and Fax Numbers:	(T) (F)
Date Application Sent:	
PC#/Permit # and/or Site Name	

To complete the Ability to Pay application, you must submit the documents marked below:

INDIVIDUAL/PARTNERSHIP APPLICANTS

- _____ 1. A **signed** copy of your three most recent federal individual income tax returns including **all schedules**.
 - _____ 2. A copy of the W-2 forms and 1099 forms used to support your most recent tax returns.
 - _____ 3. A completed, **signed and notarized** Ability to Pay Claim form.
 - _____ 4. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
 - _____ 5. A completed, signed and notarized Certification of Annual Gallonage.
 - _____ 6. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.
 - _____ 7. A completed, signed and notarized AST Storage Capacity Affidavit.
 - _____ 8. A list of all general partners, using the form enclosed.
 - _____ 9. Other:
-

BANKRUPT APPLICANTS

- _____ 1. An original **signed and notarized** Ability to Pay Bankruptcy Application form.

- _____ 2. A date-stamped copy of your Bankruptcy Petition.
- _____ 3. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
- _____ 4. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.
- _____ 5. A completed, signed and notarized Certification of Annual Gallonage.
- _____ 6. A completed, signed and notarized AST Storage Capacity Affidavit.
- _____ 7. Other: _____

CORPORATE/PARTNERSHIP APPLICANTS

- _____ 1. A completed, **signed and notarized** Corporate Ability to Pay Claim form and all documents requested in the Claim form.
- _____ 2. A completed, signed and notarized Partnership Ability to Pay application form and all documents requested in the application form.
- _____ 3. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
- _____ 4. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.
- _____ 5. Other: _____

LOCAL GOVERNMENT APPLICANTS

- _____ 1. A completed, **signed and notarized** Local Government Ability to Pay Claim Application and all documents requested in the Application form.
- _____ 2. Other: _____

FILING DEADLINE

The deadline for submission of these documents is _____ calendar days from the date these instructions were sent to you.

ADDITIONAL REQUIREMENTS

If you are involved in a site remediation for a petroleum release, depending on the results of the initial analysis, you may be required to submit estimates of the cost of performing the next phase of corrective action required at the site. If estimates are required, the Department will contact you.

WHERE TO SUBMIT APPLICATION AND OBTAIN ASSISTANCE

Please submit all application materials to: _____ **Department of Environmental Quality, Office of Financial Assurance 5th Floor, P. O. Box 10009, Richmond, VA 23240-0009.**

If you require assistance in completing the application materials, please call _____ at _____.

SPECIAL INSTRUCTIONS

cc: Regional Office:

- _____ PRO
- _____ TRO
- _____ NRO
- _____ WCRO
- _____ SCRO
- _____ SWRO
- _____ VRO
- _____ Other Regional Office Staff: _____

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**APPENDIX 2
APPLICATION FORM**

LOCAL GOVERNMENT ABILITY TO PAY APPLICATION

PC#/Registration#/Permit#/Site Name_____ (if applicable)

The Department of Environmental Quality (DEQ) requests financial information to help us evaluate your ability to pay a civil charge or penalty imposed through an enforcement action. DEQ may request additional documentation supporting the information you provide on this form.

Name of Local Government or Independent, Publicly Owned Utility:	
Contact Name and Mailing Address:	
Phone Number: ()	Fax Number ()

LOCAL GOVERNMENT FINANCIAL DATA REQUEST FORM

This form requests information regarding your locality's or utility's financial status. The data will be used to evaluate your ability to pay civil charges as part of an enforcement action. If there is not enough space for your answers, please use additional sheets of paper. Please note that we may request further documentation of any of your responses. We welcome any other information you wish to provide supporting your claim, particularly if you feel your situation is not adequately described through the information requested here.

CERTIFICATION

I declare that the data provided on this application form and in the accompanying documents is true, correct and complete to the best of my knowledge and belief.

Signature Date

Commonwealth of Virginia)
)
City/County of _____) SS:

Subscribed and sworn to before me by _____
Name of Applicant

this _____ day of _____, 20_____.

Notary Public

My commission expires: _____

REQUIRED DOCUMENTS

Please submit the following documents with your signed, completed application:

1. If you are a locality without a relevant enterprise fund (i.e., you do not use an enterprise fund to account for activities related to the enforcement action) submit:
 - completed Demographic Data Form;
 - completed Financial Data Form A;
 - annual audited financial statements for the last three years;
 - general obligation prospectuses for bonds issued in the last three years;
 - budgets developed for the last three years.

2. If you are a locality with a relevant enterprise fund (i.e., you use an enterprise fund to account for activities related to the enforcement action) or if you are an independent, publicly owned utility, please submit:
 - completed Demographic Data Form;
 - completed Financial Data Form B;
 - annual audited financial statements for the last three years;
 - revenue bond prospectuses for bonds issued in the last three years;
 - budgets developed for the last three years.

DEMOGRAPHIC DATA FORM

Local Government:	1980 Census Data	1990 Census Data
Population		
Number of Persons above age 17		
Number of Persons above age 64		
Number of Individuals Below 125% of Poverty		
Median Home Value		
Median Household Income		

1980 Census Data: U. S. Census data for 1980 is available at State Data Centers. A list of Centers located in Virginia is provided in Appendix 3.

1990 Census Data: You may download U.S. Census data from the web at <http://www.census.gov>. Once you locate the web site, perform the following actions:

1. Click on the “Search” button. Click on “Place Search” button.
2. Type in the Locality’s name and select the correct locality from the displayed list.
3. Click on its “STF3A” table button.
4. Select the relevant census tables by checking the boxes on the left side of the screen for each of the census titles for which you would like information.
5. After you have checked all the necessary boxes, scroll to the top of the page and click “Submit”.
6. Select a format to view the data.

The following table indicates which STF3A table titles correspond to the information requested by the MUNIPAY Model:

Census Designation	Census Descriptor	MUNIPAY Input Used For
P1	Persons	Population
P13	Age	No. of Persons above age 17
P13	Age	No. of Persons above age 64
P121	Ratio of Income to Poverty Level	No. of Individuals Below 125% of Poverty
H61A	Median Value	Median Home Value
P80A	Median Household Income	Median Household Income

FINANCIAL DATA FORM A
(CITY,TOWN, VILLAGE OR COUNTY)

<u>Most Recent Fiscal Year:</u>	
General Fund Unreserved Ending Balance	
Total Principal and Interest Payments	
Total Revenues for all Governmental Funds (excluding transfers between such funds)	
<u>Most Recent Estimates for:</u>	
Market Value of Taxable Property	
Property Tax Collection Rate (%)	
Median Household Income & Year of Estimate	
Population & Year of Estimate	
Prior Estimate for Population & Year of Estimate	
<u>Debt Statistics:</u>	
Direct Net Debt	
Overall Net Debt	
Most Recent General Obligation Debt Rating	
State Limit for General Obligation Debt Level, if applicable	
Next Year's Budgeted/Anticipated General Fund Expenditures Plus Net Transfers Out	

FINANCIAL DATA FORM B

(LOCAL GOVERNMENT WITH RELEVANT ENTERPRISE FUND
OR INDEPENDENT AND PUBLICLY OWNED UTILITY)

General Fund: (omit for an Independent and Publicly Owned Utility)	
General Fund Unreserved Ending Balance for Most Recent FY	
Next Year's Budgeted/Anticipated General Fund Expenditures Plus Net Transfers Out	
Balance Sheet for Most Recent Fiscal Year:	
Current Assets	
Current Liabilities	
Total Liabilities	
Revenues & Expenses for Most Recent Fiscal Year:	
Operating Revenues	
Operating Expenses	
Most Recent Estimates for:	
Residential Portion of System Revenue	
Service Households	
Median Household Income and Year of Estimate	
Miscellaneous Data:	
Next Year's Budgeted/Anticipated General Fund Expenditures Plus Net Transfers Out	
Most Recent Revenue Debt Rating	
Annual Residential Charges on 90,000 Gallon Consumption	
Total Principal and Interest Payments	

FINANCIAL DATA REQUEST FORM	
<u>COMMON FINANCIAL DATA</u>	
General Fund Unreserved Balance (for most recent fiscal year; omit if an independent utility)	
Anticipated General Fund Expenditures Plus Net Transfers (budgeted or projected)	
Median Household Income (either U.S. Census or more recent estimate)	
Year Of Estimate (if U.S. Census, year should be 1989)	
<u>CITY/TOWN VILLAGE FINANCIAL DATA (i.e., Governmental Funds)</u>	
Annual Debt Payments (sum of principal and interest payments for all Governmental Funds)	
Total Revenues (for all Governmental Funds, but exclude transfers between funds)	
Direct Net Debt (gross debt incurred in municipality's name, less short-term and revenue debt)	
Overall Net Debt (above + overlapping/underlying government units' debt apportioned by property value)	
State Debt Limit (attach calculations, or note if state imposes no such limit)	
Market Value of Taxable Property (attach calculations if converted from assessed)	
Median Home Value (either U.S. Census, or more recent estimate)	
Year of Estimate (if U.S. Census, year should be 1990)	
Population (either U.S. Census, or more recent estimate)	
<u>ENTERPRISE FUND FINANCIAL DATA</u>	
Current Assets (exclude any restricted assets)	
Current Liabilities (exclude liabilities payable from restricted assets)	
Total Liabilities	
Total Equity	
Annual Debt Payments (sum of principal and interest payments from Statement of Cash Flows)	
Operating Revenues	
Operating Expenses	
Anticipated Expenses Plus Net Transfers (budgeted or projected)	
Average Annual Residential Charge (typically based on 90,000 gallons for water/sewer)	
Serviced Households (if unknown, use number of households from U. S. Census)	

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**APPENDIX 3
STATE DATA CENTERS**

CENSUS STATE DATA CENTERS: VIRGINIA

Virginia Employment Commission
703 East Main Street
Richmond, Virginia 23219
Mr. Don Lillywhite
804-786-7496
804-371-0412 (fax)
dlillywhite@vec.state.va.us

Center for Public Service
University of Virginia
918 Emmet Street North, Suite 300
Charlottesville, Virginia 22903-4823
Dr. Michael Spar
804-982-5585
mas6q@poe.acc.virginia.edu

Library of Virginia
Documents Section
800 East Broad Street
Richmond, Virginia 23219-3491
Ms. Mary Clark
804-787-2175
804-225-4035 (fax)